IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR

JUDGMENT
IN
S.B. Criminal Appeal No.352/2003

Kalu Singh S/o Shri Natthu Singh
Versus
State of Rajasthan through P.P.

Date of Judgment :::: 20th April, 2007

PRESENT
Hon'ble Mr. Justice Narendra Kumar Jain

Shri Kuldeep Sharma, Counsel for the accused-appellant
Shri Brahmanand Sandu and
Mrs. Nirmala Sharma, P.P., for the respondent State
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//Reportable//

By the Court:-

Accused-appellant Kalu Singh S/o Shri Natthu Singh has preferred this appeal challenging the impugned judgment and order dated 25th February, 2003, passed by the Special Judge, Women Atrocities and Dowry Cases & Additional Sessions Judge, Jaipur City, Jaipur, in Sessions Case No.140/2000, whereby he was convicted and sentenced under Section 376, IPC, to undergo seven years rigorous imprisonment and a fine of Rupees one thousand; in default of payment of fine, to further undergo two months additional simple imprisonment.

Briefly stated, the facts of the case are that PW-1 Harinarain lodged a written-report (Exhibit P-1) dated 24th September, 2000, at Police Station – Sanganer Sadar, Jaipur City (South), Jaipur, wherein it was written that at about 9.50 PM he was sitting in his house talking with one Kailash; they saw one mad woman walking outside and one person caught hold of her; that man took her in dark near Ravjani Agriculture Field and committed rape. He and Kailash both did not go there. He saw a police jeep coming from Sanganer side; he asked to stop it and told that a person is committing rape with a mad woman. He along with Kailash and police officials went at the place of incident and saw the said person in necked condition committing rape with that mad woman. Thereafter Mahesh, Ramakant and other persons also came there. On asking, he told his name as Kalu Singh and mad woman was disclosing her name as Sushila. On the basis of this information, the police registered FIR No.190/2000 under Section 376, IPC, and started investigation. The prosecutrix as well as accused both were medically examined.

After completion of investigation, the police filed a charge-sheet against the accused. The trial

court framed charge against the accused under Section 376, IPC, which was denied and trial was claimed. The prosecution examined 9 witnesses and also produced documentary evidence. The accused, in his statement, recorded under Section 313, Cr.P.C. stated that the case is false and he has not committed any crime. The learned trial court, after considering evidence on the record and submissions of both the parties, convicted and sentenced the accused-appellant, as mentioned above.

The learned counsel for the appellant contended that in the facts and circumstances of the case, the prosecution failed to prove the case against the accused beyond all reasonable doubts and the trial court has committed an illegality in convicting the accused-appellant. He pointed out the number of discrepancies in the case, which are fatal to the prosecution case, like the prosecutrix Sushila herself was not examined, the investigating officer Prithvi Singh was not examined; as per the medical-report of Sushila (Exhibit P-12) she was not found virgin and no opinion was given about rape and the opinion was reserved and subsequently FSL Report was not proved and exhibited in the case, the author of the FIR

Harinarain was declared hostile by the prosecution, the members of petrolling party i.e. police officials, who were available in the police jeep were not examined and on the basis of these deficiencies, he contended that the prosecution failed to prove its case against the accused-appellant beyond all reasonable doubts and accused is entitled to get the benefit of that doubt.

The learned counsel for the accused-appellant lastly contended that although, in view of his above submissions, the charge under Section 376, IPC, is not made out against the accused-appellant and he is liable to be acquitted, and, even if, this Court does not agree with his submissions, his case for reduction of sentence may be considered and his sentence of imprisonment, awarded by the trial court, may be reduced to a period of imprisonment of 4 years 5 months, already undergone by him. He contended that during trial of the case, the accused remained in custody for about 3 months 12 days and since the date of judgment of the trial court i.e. 25.2.2003 he is in judicial custody and this period of his imprisonment is about 4 years 1 month and 19 days, therefore, till now he has completed his sentence of imprisonment for

about 4 years and 5 months.

The learned Public Prosecutor supported the judgment of the trial court and contended that the appellant has committed rape with a mad woman and the trial court has rightly convicted him and his appeal deserves to be dismissed.

I have considered the submissions of the learned counsel for both the parties and minutely scanned the impugned judgment as well as the record of the trial court.

The Hon'ble Supreme Court in a recent judgment dated 29.9.2006 in Appeal (Crl.) No.1036/2005, titled Tarkeshwar Sahu Vs. State of Bihar (Now Jharkhand), referred its earlier decision in the case of Aman Kumar & Another Vs. State of Haryana, wherein the Hon'ble Apex Court stated as under:-

> "Penetration is the sine qua non for an offence of rape. In order to constitute penetration, there must be evidence clear and cogent to prove that some part of the virile member of the accused was within the labia of the pudendum of the woman, no matter how little."

The Hon'ble Apex Court in **Lakshmi Singh and Others Vs. State of Bihar** – **(1976) 4 SCC 394**, in Para No.14 thereof, observed that –

> "..... This is also, therefore, shows that the defence version may be true. It is well settled that it is not necessary for the defence to prove its case with the same rigour as the prosecution is required to prove its case, and it is sufficient if the defence succeeds in throwing a reasonable doubt on the prosecution case which is sufficient to enable the court to reject the prosecution version."

The initial version about incident in the present case is Exhibit P–1, a written–report, lodged by PW–1 Harinarain, who stated about commitment of forcible sexual intercourse by the accused with prosecutrix Sushila. He also mentioned in Exhibit P–1 that he was talking with Kailash at the relevant time; Mahesh, Ramakant and other persons also came at the spot. The police party was also petrolling in the police jeep. The author of written–report – Harinarain PW–1 was declared hostile by the prosecution during trial of the case. On cross–examination by the Public Prosecutor, he stated that he did not see the accused–person in the court with woman at the spot. Names of Mahesh (PW–6) and Ramakant (PW–4) were mentioned in

the written-report (Exhibit P-1) but both were declared hostile by the prosecution. It was also written in the written-report (Exhibit P-1) that a police vehicle came at the spot and Harinarain, the author of written-report, went at the spot with police officials and Kailash Chand. No member of police party, sitting in police vehicle, has been examined on behalf of the prosecution in the case. The prosecutrix Sushila was medically examined on 25th September, 2000, itself by PW-1 Dr. K.G. Banerjee, who gave his opinion as under:-

> "(1) Nothing is suggestive that she is virgin; (2) Opinion regarding recent sexual intercourse can be given after getting chemical analyzing report for which two vulva vaginal slides and one swab stick has been taken sealed and handed over to the accompanying person for evidence of spermatozoa, blood, gonococcuional smearial KB fluid."

Dr. K.G. Banerjee (PW-9) specifically mentioned in Exhibit P-12, the report dated 25.9.2000, that "psychiatrist evaluation of victim is needed", but it is not on the record that victim Sushila was sent for psychiatric treatment and no report in this regard is available on the file. It is not understandable that when victim was taken to hospital then why she was not examined by Investigating Officer under Section 161,

Cr.P.C., or why her statement was not got recorded before the Judicial Magistrate under Section 164, Cr.P.C. The Investigating Officer of the case Shri Prithvi Singh has also not been examined by the prosecution in the case. There is no explanation on behalf of the prosecution as to why the statement of Sushila was not recorded under Section 161, Cr.P.C. It is also not on the record that she was mad or she was given any psychiatric treatment. PW-9 Dr. K.G. Banerjee has proved Exhibit P-12, the medical-report of Sushila, wherein he opined that nothing is suggestive that she is virgin. Her age has not been mentioned in Exhibit P-12. The Medical Officer advised examination of prosecutrix for age estimation but nothing is on the record to show whether she was medically examined for determination of age, or not, and no report in this regard is available. No other medical officer, except PW-9 Dr. K.G. Banerjee, has been examined on behalf of the prosecution in the case. In absence of any specific evidence in respect of psychiatric treatment of Sushila or medical report in this regard or statement of any Doctor it cannot be presumed that she was insane or mad or lunatic.

As per Section 118 of the Indian Evidence Act,

all persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind. The explanation has been added to Section 118 and as per the explanation, a lunatic is not incompetent to testify, unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them.

Although, in the present case there is no clear and cogent evidence to prove that the prosecutrix was mad, but even if she was mad then it was a duty of the prosecution to produce her before the court and it was for the court to satisfy itself that she was competent to give her statement, or not. Admittedly, the prosecutrix was not examined before the trial court, therefore, there is no such remark or opinion of the trial court in this regard. The Investigating Officer himself has not been examined and there is no explanation on behalf of the prosecution as to why the statement of the prosecutrix has not been recorded under Section 161 or 164, Cr.P.C. The prosecutrix was

available and it is proved that she was medically examined and she could have been examined by the Investigating Officer also under Section 161, Cr.P.C., but she was not examined nor any explanation for it is available on the record. The only evidence in the present case in support of the charge against the accused is of PW-2 Kailash Chand, but his statement is neither corroborated by the statement of PW-1 Harinarain or by the Investigating Officer or by the prosecutrix or by the member of the petrolling party i.e. police officials, who were available at the spot.

The FSL report in the present case was filed and the same is on the record, which has given negative result. However, the same cannot be treated as part of the record as neither it has been proved nor exhibited nor the accused got chance to cross-examine on it.

In these circumstances, the necessary evidence to prove the charge of rape either by the statement of prosecutrix or by the medical-report is not available on record, except the statement of PW-2 Kailash Chand, whose testimony cannot be believed for want of proper corroboration, as mentioned above. The rape has been

defined under Section 375, IPC, which reads as under:-

> **"375. Rape.**-A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:-
>
> First.-Against her will.
>
> Secondly.-Without her consent.
>
> Thirdly.-With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.
>
> Fourthly.-With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.
>
> Fifthly.-With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.
>
> Sixthly.-With or without her consent, when she is under sixteen years of age.
>
> Explanation.-Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.
>
> Exception.-Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not

rape."

The above definition of "rape" makes it clear that there must be sexual intercourse with a woman. As per explanation – penetration is sufficient to constitute the sexual intercourse to the offence of rape.

Admittedly, the prosecutrix has not been examined in the present case. PW-9 Dr. K.G. Banerjee has not specifically opined about sexual intercourse or penetration. The best evidence in respect of penetration could have been of prosecutrix herself, but, in the present case, neither the statement of prosecutrix is available nor any medical evidence in this regard is available.

The learned Public Prosecutor, during the course of argument, referred Exhibit P-10, the seizure-memo of underwear of the accused, and contended that stains of semen were found on it but it is relevant to mention that S.H.O., who prepared Exhibit P-10 has not proved it. There were two witnesses to this seizure-memo, namely, Mahesh (PW-6) and Radheyshyam (PW-7) and both have been declared

hostile by the prosecution, therefore, the contents of Exhibit P-10 are not proved by the prosecution evidence in the present case.

In view of the above discussion and reasons, I am of the view that the prosecution has failed to prove its case against the accused-appellant beyond all reasonable doubts and, in the facts and circumstances of the present case, he is entitled to get the benefit of doubt.

Consequently, the appeal succeeds. The impugned judgment and order passed by the trial court is set-aside. The accused-appellant is in jail, therefore, he may be set at liberty forthwith, if his custody is not required in any other case.

(Narendra Kumar Jain) J.

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